IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

CWP No. 180 of 2001
alongwith other connected matters

Reserved on: 17.05.2012

Decided on: 31.05.2012

CWP No. 180 of 2001

1. The State of H.P. through Secretary (HPPWD), Government of H.P.

2. The Superintending Engineer, 11th Circle, HPPWD, Rampur Bushahr, (H.P.)

…Petitioners.

Versus

1. Ram Lal,

2. Pitamber Dass,
   Both sons of Sh. Sarab Dayal;

3. Bal Dassi,

4. Shanti Devi,

5. Asha Kumari,
   All daughters of Sh. Sarab Dayal;

6. Pushpa Devi,
   Daughter-in-law of Sh. Sarab Dayal;

7. Marshal,

8. Diyanash,
   Both Grand Sons of Sh. Sarab Dayal,

   All residents of village Karsoli, P.O. Narian, Tehsil Rampur Bushahr, District Shimla, H.P.

…Respondents.

Civil Writ Petition under Article 226/227 of the Constitution of India.

Coram

The Hon'ble Mr. Justice Deepak Gupta, J.

The Hon'ble Mr. Justice V.K. Ahuja, J.

Whether approved for reporting?[1] *Yes.*

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[1] *Whether the reporters of local papers may be allowed to see the Judgment? Yes.*

For the petitioner(s): Mr. R.K. Bawa, Advocate General, with Mr. Vivek Singh Thakur, Additional Advocate General and Mr. Rajesh Mandhotra, Deputy Advocate General.

For the respondent(s): Mr. A.K. Gupta, Mr. Bhuvnesh Sharma, Mr. Ramakant Sharma, Mr. K.K. Verma and Mr. Dheeraj K. Verma, Advocates.

Deepak Gupta, J.

By this judgment we are dealing with and deciding common questions of law which have arisen in hundreds of cases. Arguments in all these cases were heard altogether, but the judgment is being delivered in CWP No. 180 of 2001, but shall govern the decision in the other connected matters. A copy of this judgment shall be placed on the record of all the connected matters.

2. The following common question of law arises in these petitions:

> **"Whether the services rendered on daily waged basis by the employees before their regularization/grant of work charged status are to be taken into consideration for the purpose of counting their qualifying service for grant of pension under the Central Civil Services (Pension) Rules, 1972, and if so, to what extent."**

The Background:

3. It would be pertinent to mention that earlier vide our judgment dated 19.07.2007, we had held as follows:

> *"We are, therefore, of the considered view that 50% of the continuous service rendered by the employees on daily rated basis followed by work charge/ regular employment should be taken into account while calculating the qualifying service for purposes of entitlement to and the amount of pension to be paid to them."*

The State filed Special Leave Petition before the Apex Court raising new questions before the Apex Court and, therefore, all the matters were again remanded to us. The Apex Court held as follows:

> *"We have perused the records and heard the learned counsel for the parties. We are of the considered view that an entirely new case has been weaved out before this Court. There are no pleadings to that effect. In this view of the matter, we are constrained to set aside the impugned judgment of the High Court and remit the matters to the High Court for fresh adjudication. To avoid any confusion, we direct the State to file a comprehensive amended writ petition in the High Court within eight weeks and reply of the same be filed within eight weeks thereafter and rejoinder, if any, within four weeks thereafter."*

Consequent to the directions of the Apex Court, a consolidated comprehensive writ petition was filed and, thereafter, we heard all the learned counsel for the parties.

4. The employees in most of these cases were initially employed as daily rated workmen in the Public Works Department (PWD) or the Irrigation and Public Health (IPH) Departments of the State of Himachal Pradesh. Services of most of the employees were regularized in terms of the scheme framed by the Government and approved by the Apex Court in **Mool Raj Upadhyaya versus State of H.P. and others, 1994 Supp. (2) SCC 316,** relevant portion of which reads as follows:-

> *"(1) Daily-wage/muster-roll workers, whether skilled or unskilled, who have completed 10 years or more of continuous service with a minimum of 240 days in a calendar year on 31.12.1993, shall be appointed as work-charged employees with effect from 1.1.1994 and shall be put in the time-scale of pay applicable to the corresponding lowest grade in the Government;*
>
> *(2) daily wage/muster-roll workers, whether skilled or unskilled who have not completed 10 years of continuous service with a minimum of 240 days in a calendar year on 31.12.1993, shall be appointed as workcharged employees with effect from the date they complete the said period of 10 years of service and on such appointment they shall be put in the time-scale of pay applicable to the lowest grade in the Government;*
>
> *(3) daily-wage / muster-roll workers, whether skilled or unskilled who have not completed 10 years of*

> *service with a minimum of 240 days in a calendar year on 31.12.1993, shall be paid daily wages at the rates prescribed by the Government of Himachal Pradesh from time to time for daily-wage employees falling in Class III and Class IV till they are appointed as workcharged employees in accordance with paragraph 2;*
>
> *(4) daily-wage/muster-roll workers shall be regularized in a phased manner on the basis of seniority-cum-suitability including physical fitness. On regularization they shall be put in the minimum of the time-scale payable to the corresponding lowest grade applicable to the Government and would be entitled to all other benefits available to regular government servants of the corresponding grade."*

5. As per the policy framed by the Government, the services of all the daily rated workmen who had completed 10 years uninterrupted services, were to be placed on the work charge establishment. It would be pertinent to mention that the services of a few of the employees were placed on work charge establishment even prior to the judgment in **Mool Raj Upadhyaya's** case. The employees after being placed in the work charge establishment were brought on the regular establishment. However, when the employees superannuated from service on attaining the age of superannuation, the benefit of the service rendered by them on daily wages was not given to them. Consequently, the employees filed Original Applications before the erstwhile H. P. State Administrative Tribunal.

6. The learned Tribunal passed three separate types of orders in various cases. In some cases, like the one out of which the present writ petition arises, a direction was given by the learned Tribunal that the employee be regularized from an earlier date so that the employee has ten years of regular service and becomes entitled to grant of pensionary benefits. In some cases, the learned Tribunal directed that the entire service rendered on daily wage service shall be

counted for reckoning the qualifying service. The majority of cases fall in the third category wherein the learned Tribunal relying upon Memorandum No. 2 under Rule 14 of the CCS (Pension) Rules held that the employees were held entitled to the benefit of counting half of the service rendered on daily wage basis and half of their service on daily wage basis was added to their entire service on regular basis to arrive at the qualifying service for the purpose of pension. We had, by our earlier decision, also relied upon the Government of India, Ministry of Finance Office Memorandum dated 14th May, 1968.

7. Before the Apex Court, the stand taken by the State was that the Office Memorandum in question was never adopted by the State of Himachal Pradesh either for the payment of pension or for payment of gratuity. It appears that before the Apex Court, it was stated that this Office Memorandum had never been filed before this Court by any of the parties and was handed over to the Court by the learned counsel for the employees at the time of hearing.

8. There is another category of cases which are being again decided by this judgment. During the pendency of the Special Leave Petition before the Apex Court, various writ petitions were decided by other Benches of this Court wherein the petitions were disposed of, but it was made clear that the parties would abide by the judgment of the Apex Court in appeal arising out of CWP No. 180 of 2001, titled State of H.P. versus Sarab Dayal. Since the rights of the persons in these petitions were also going to be effected, we heard the other writ petitions also. We have also dealt with some writ petitions which have been directly filed in this Court after the decision in Sarab Dayal's case.

9. At this stage, it would be pertinent to mention that after the case was remanded from the Apex Court, Sarab Dayal died and his legal heirs have been brought on record and thus, the title of the case has changed to State of H.P. versus Ram Lal and others.

10. We are constrained to observe that a senior officer of the rank of Secretary to the Government of Himachal Pradesh filed a totally false affidavit before the Apex Court. In fact, as noted in our earlier judgment also, the learned Tribunal itself had noticed this memorandum and in a large number of cases granted benefit of 50% of the service rendered on daily wages to be counted towards qualifying service for pensionary benefits. In a large number of writ petitions, the State itself had made reference to the Office Memorandum in the main writ petition and had contended that the Office Memorandum applied only to the contingent employees and not to daily waged employees. Reference may be made to the order of the learned Tribunal in **OA (D) No. 26 of 2001, titled Kartar Singh versus State of H.P. and others,** which reads as follows:

> *"3. This view of the respondents State is not sustainable in view of the provisions laid down in CCS (Pension) Rule 14 which lays down the condition subject to which service qualifying for grant of pensionary benefits. Under these rules, the Govt. of India vide its O.M. No. 12 (1) E.V./68 dated May 14, 1968 has clearly laid down that in pursuance of the recommendation of the Council, it has been decided that half of the service paid from contingency will be allowed to count towards pension at the time of absorption in regular employment in respect of service paid from contingency involving whole time employment. Admittedly, the applicant was being paid daily wages for the full time work and the applicant was not working on part time basis. Thus the applicant has worked for 10 years on daily wage basis and as such his service for pension @ half will come to five years plus five years and three of these rules he is entitled for pension after ten years of qualifying service. The applicant has been retired on superannuation and in accordance with the provisions of CCS (Pension) Rules, as such he is entitled for grant of pension."*

11. The averments made by the State in **CWP No. 1361 of 2002**, titled **State of H.P. and others versus Kartar Singh**, read as follows:

> *".....*
> *The Hon'ble Tribunal has gravely erred in holding the respondent entitle for counting of ½ of his daily waged service for pensionary benefits by applying the provision of decision No. II of the Govt. of India below rule 14 contained in OM No. E-12(1)E-V/68 dated 14.5.68 whereas the fact is that this provision of rule will clearly show that only that service is countable for pensionary benefits which has been paid from the contingency funds whereas in the present case, the respondent while working on daily wages workers had been paid from the work concerned. Therefore, this provision of rules is not applicable in the present case.*
> *....."*

12. Thus, it is clear that the Office Memorandum was not produced before this Court only at the time of hearing. Be that as it may, now that the matter has been referred back to us, we are considering the question whether the Office Memorandum is indeed applicable or not.

The Historical Background:

13. To appreciate this question, it would be relevant to point out that the State of Himachal Pradesh was initially constituted as a Part-C State in the year 1948. However, with effect from 01.07.1963, Himachal Pradesh became a Union Territory within the meaning of the Government of Union Territories Act, 1963. On 1st November, 1966, after the enactment of the Punjab Reorganization Act of 1966, certain hilly areas of the State of Punjab were merged in the Union Territory of Himachal Pradesh. The Union Territory of Himachal Pradesh became a full fledged State w.e.f. 25th January, 1971 in terms of the State of Himachal Pradesh Act, 1970. It is in this context that we have to understand the applicability of the Office Memorandum issued by the Central Government prior to 25th January, 1971.

14. As noted above, the stand of the State before the Apex Court was that the State of Himachal Pradesh had never adopted the Office Memorandum referred to above. On 14th May, 1968, the State of Himachal Pradesh was a Union Territory governed by the Government of Union Territories Act, 1963. In terms of this Act, especially proviso to Section 58 (2), the tenure, remuneration and terms and conditions of service of any officer could not be altered to his disadvantage without the previous sanction of the Central Government. The Government of Union Territories Act did not entitle the Union Territory to frame its own rules and in case it framed its own rules, it was required to obtain prior approval of the Central Government. In the Union Territories, the Central Rules were applicable. Therefore, on 4th April, 2012, after taking into consideration all these rules, we had directed the Secretary (Finance) to the Government of Himachal Pradesh to file a fresh affidavit stating whether such notifications or memorandums issued by the Central Government were *ipso facto* applicable or whether the Union Territory followed the practice of issuing notifications making them applicable in the Union Territory.

15. The Principal Secretary (Finance) to the Government of Himachal Pradesh, Shri Shrikant Baldi, has filed an affidavit, relevant portion of which reads as follows:

> *"3. That in this connection it is stated that prior to 1971, the Himachal Pradesh was a Union Territory and the Central Civil Regulations (CSR) as notified by the Govt. of India from time to time were applicable to the employees of the Union Territory including the office memoranda and other notifications issued by the Central Government there under as per para-2 of the Government of India, Ministry of Home Affairs letter No. F.28/59-Him dated 13th July, 1959 (Annexure R-I). Hence, it appears that Notifications and Office Memoranda issued by the Government of India were applicable to Union Territory of Himachal Pradesh."*

Therefore, at this stage, it is not seriously disputed that in 1968 when this Office Memorandum was issued, the same automatically applied in the Union Territory of Himachal Pradesh.

16. As earlier pointed out, the State of Himachal Pradesh was constituted on 25th January, 1971, under the State of Himachal Pradesh Act, 1970. Obviously, the State has the power to make its own rules and, thereafter, the rules of the Centre would not *ipso facto* be applicable.

17. Having said so, we must make reference to Section 49 of the State of Himachal Pradesh Act, which reads as follows:

> *"**49. Continuance of existing las and their adaptation.***
>
> *(1). All laws in force, immediately before the appointed day, in the existing Union territory of Himachal Pradesh shall continue to be in force in the State of Himachal Pradesh until altered, repealed or amended by a competent Legislature or other competent authority.*
>
> *(2). For the purpose of facilitating the application in relation to the State of Himachal Pradesh of any law made before the appointed day, the appropriate Government may, within two years from that day, by order, make such adaptations and modifications of the law, whether by way of repeal or amendment, as may be necessary or expedient, and thereupon every such law shall have effect subject to the adaptations and modifications so made until altered, repealed or amended by a competent Legislature or other competent authority.*
>
> ***Explanation**. - In this section, the expression "appropriate Government" means, as respects any law relating to a matter enumerated in the Union List in the Seventh Schedule to the Constitution, the Central Government; and as respects any other law, the Government of the State of Himachal Pradesh."*

18. A bare perusal of this Section shows that all laws in force immediately before the appointed day, i.e. 25th January, 1971, would continue to be in force until altered, repealed or amended by the State Legislature. Under Sub-section (2) of Section 49, the State of Himachal Pradesh could make an adaptation and modification of the laws by way

of repeal or amendment in respect of laws which fell within the State list.

19. Here, it would be pertinent to mention that on 20th August, 1971, the H.P. Government issued an Office Memorandum directing the continuance of service rules, regulations and instructions consequent upon Himachal Pradesh becoming a State. In this Office Memorandum, it was stated that the Central Rules would continue to apply. However, there was no specific mention of the Civil Service Regulations or the Pension Chapter thereof. Thereafter, on 1st January, 1972, another Office Memorandum was issued wherein it was stated that the State of Himachal Pradesh had decided in consultation with the Government of India to enforce the Punjab Civil Service Rules in the State of Himachal Pradesh w.e.f. 1st January, 1972. This included the pension chapter of the Civil Service Regulations and the liberalized pension rules. The employees in the State of Himachal Pradesh were held entitled to exercise an option to either retain the existing Central Civil Service Rules or to adopt for the Punjab Civil Service Rules. In case the government servants failed to exercise such option, they would be deemed to have opted for the Punjab Rules. The time for exercising the option was extended from time to time up to 31.03.1973. On 18.01.1973, the State took a totally different decision. It was observed that a majority of State Government employees have not exercised their option for either set of the Rules. It was further directed that the State had decided that the old Rules (Central Rules), as they existed on 31.12.1971, would continue to be in force and would be deemed to be the Rules of the State Government till all the employees had exercised

their option. Finally, on 30.03.1974, the State issued a notification, relevant portion of which reads as follows:

> *"In exercise of the powers conferred by the proviso to Article 309 of the Constitution of India and all other powers enabling him in this behalf, the governor, Himachal Pradesh, is pleased to revoke the earlier decision regarding enforcement of Punjab Civil Service Rules, Volumes I, II and III with effect from 1-1-1972, from the same date.*
>
> *2. The Governor is also pleased to order that the Central Civil Service Rules, namely:*
>
> 1. *Fundamental Rules and Supplementary Rules;*
> 2. *Pension Chapter of the Civil Service Regulations;*
> 3. *Liberalized Pension Rules/Central Civil Services (Pension) Rules, 1972;*
> 4. *Family Pension Scheme for Central Government employees, 1964;*
> 5. *General Provident Fund (Central Services) Rules, 1960;*
> 6. *Civil Pension Commutation Rules;*
> 7. *Contributory Provident Fund (India) Rules, 1960;*
> 8. *Study Leave Rules, 1962;*
> 9. *Revised Leave Rules, 1933/Central Civil Services (Leave) Rules, 1972;*
> 10. *Central Civil Services (Temporary Service) Rules, 1965;*
> 11. *Central Civil Services (Classification, Control and Appeal) Rules, 1965;*
> 12. *Central Civil Services (Conduct) Rules, 1964; and*
> 13. *Leave Travel Concession Scheme of the Central Government;*
>
> *will be deemed to have been in force in Himachal Pradesh during this period, and will be deemed to be State Rules in respect of the various matters covered by them. These Rules will remain applicable to Himachal Pradesh Govt. employees.*
>
> *3. The Governor, Himachal Pradesh, is also pleased to decide that the Government servants who have*

> *already opted for the Punjab Civil Service Rules in pursuance of the earlier decision of the Govt. will be entitled to exercise their options afresh, for being governed by the Central Civil Service Rules listed above. The option will be exercisable within a period of 3 months from the date of issue of this order. Those Govt. servants who have already exercised their options for the Punjab Civil Service Rules in pursuance of earlier decision and desire to be governed by such rules shall be governed by those rules if they do not exercise their options as aforesaid. The cases of employees who have retired or whose cases have been decided before the date of issue of this notification shall not be re-opened and will be deemed to be governed in accordance with the Punjab or Central Civil Service Rules as the case may be for which they have given their options."*

20. At this stage, it would be pertinent to mention that the CCS (Pension) Rules were framed by the Central Government in the year 1972 and enforced w.e.f. 1st June, 1972. However, prior to the issuance of the letter dated 30.03.1974, there is no material on record to show that the State of Himachal Pradesh had made these rules applicable in the State.

21. From the aforesaid facts, it is apparent that the Government of India Notification dated 14th May, 1968 decision under Rule 14 was *ipso facto* applicable in the Union Territory of Himachal Pradesh. There was no requirement that the State had to pass an order adopting the said notification. The Memorandum automatically applied in the Union Territory. In terms of Section 49 of of the State of Himachal Pradesh Act, referred to above, these rules continued to be in force and, therefore, the Office Memorandum also continued to apply.

22. We are of the considered view that there can be no dispute that the Office Memorandum in question was applicable in the State of Himachal Pradesh till 1st June, 1972 when the Central Civil Service (Pension) Rules were enforced or at best till 30th March, 1974, when the notification, quoted hereinabove, was issued.

23. The main issue is whether after the State of Himachal Pradesh adopted the Central Civil Service (Pension) Rules, 1972, was the Office Memorandum still applicable or not?

The Legal Provisions:

24. To appreciate the aforesaid submissions, it would be relevant to refer to the various legal provisions of the Pension Rules. Rule 2 of the Pension Rules provides that the rules shall apply to all government servants, but shall not apply to :

> *"(a) x x x x x x x x x x x x x x x x x x x x*
>
> *(b) persons in casual and daily-rated employment;*
>
> *(c) persons paid from contingencies."*

25. Relevant portion of Rule 13 reads as follows:-

> *"**13. Commencement of qualifying service***
> *Subject to the provisions of these rules, qualifying service of a Government servant shall commence from the date he takes charge of the post to which he is first appointed either substantively or in an officiating or temporary capacity:*
>
> *Provided that officiating or temporary service is followed without interruption by substantive appointment in the same or another service or post."*

26. Rule 14 reads thus:

> *"**14. Conditions subject to which service qualifies***
>
> *(1) The service of a Government servant shall not qualify unless his duties and pay are regulated by the Government, or under conditions determined by the Government.*
>
> *(2) For the purposes of sub-rule (1), the expression "Service" means service under the Government and paid by that Government from the Consolidated Fund of India or a Local Fund administered by that Government but does not include service in a non-pensionable establishment unless such service is treated as qualifying service by that Government.*
>
> *(3) In the case of a Government servant belonging to a State Government, who is permanently transferred to a service or post to which these rules apply, the*

continuous service rendered under the State Government in an officiating or temporary capacity, if any, followed without interruption by substantive appointment, or the continuous service rendered under that Government in an officiating or temporary capacity, as the case may be, shall qualify:

Provided that nothing contained in this sub-rule shall apply to any such Government servant who is appointed otherwise than by deputation to a service or post to which these rules apply."

27. Rule 49 of the Rules reads as follows:-

"***49. Amount of Pension***
(1) In the case of a Government servant retiring in accordance with the provisions of these rules before completing qualifying service of ten years, the amount of service gratuity shall be calculated at the rate of half month's emoluments for every completed six monthly period of qualifying service.

(2) (a) In the case of a Government servant retiring in accordance with the provisions of these rules after completing qualifying service of not less than thirty three years, the amount of pension shall be calculated at fifty per cent of average emoluments, subject to a maximum of four thousand and five hundred rupees per mensum.

(b) In the case of a Government servant retiring in accordance with the provisions of these rules before completing qualifying service of thirty-three years, but after completing qualifying service of ten years, the amount of pension shall be proportionate to the amount of pension admissible under Clause (a) and in no case the amount of pension shall be less than [Rupees three hundred and seventy-five] per mensem.

(c) notwithstanding anything contained in Clause (a) and Clause (b), the amount of invalid pension shall not be less than the amount of family pension admissible under sub-rule (2) of Rule 54.

(3)In calculating the length of qualifying service, fraction of a year equal to three months and above shall be treated as a completed one half year and reckoned as qualifying service.

(4)The amount of pension finally determined under Clause (a) or Clause (b) of sub-rule (2), shall be expressed in whole rupees and where the pension contains a fraction of a rupee it shall be rounded off to the next higher rupee.

(5) } Deleted

(6) } Deleted."

28. The Government of India has taken a decision under Rule 14 which has been notified by G.I., M.F., O.M. No. F. 12(1)-E. V/68, dated the 14th May, 1968. The said decision reads as follows:-

> *"**Counting half of the service paid from contingencies with regular service**.- Under Article 368 of the CSRs (Rule 14), periods of service paid from contingencies do not count as qualifying service for pension. In some cases, employees paid from contingencies are employed in types of work requiring services of whose-time workers and are paid on monthly rates of pay or daily rates computed and paid on monthly basis and on being found fit brought on to regular establishment. The question whether in such cases service paid from contingencies should be allowed to count for pension and if so, to what extent has been considered in the National Council and in pursuance of the recommendation of the Council, it has been decided that half the service paid from contingencies will be allowed to count towards pension at the time of absorption in regular employment subject to the following conditions, viz:-*
>
> *(a) Service paid from contingencies should have been in a job involving whole-time employment (and not part-time for a portion of the day).*
>
> *(b) Service paid from contingencies should be in a type of work or job for which regular posts could have been sanctioned, e.g., malis, chowkidars, khalasis, etc.*
>
> *(c) The service should have been one for which the payment is made either on monthly or daily rates computed and paid on a monthly basis and which though not analogous to the regular scale of pay should bear some relation in the matter of pay to those being paid for similar jobs being performed by staffs in regular establishments.*
>
> *(d) The service paid from contingencies should have been continuous and followed by absorption in regular employment without a break.*
>
> *(e) Subject to the above conditions being fulfilled, the weightage for past service paid from contingencies will be limited to the period after 1st January, 1961, for which authentic records of service may be available.*
>
> *It has been decided that half the service paid from contingencies will be allowed to be counted for the purpose of terminal gratuity as admissible under the CCS (TS) Rues, 1965, where the staff paid from contingencies is subsequently appointed on regular*

> *basis. The benefit will be subject to the conditions laid down in OM, dated the 14th May, 1968, above."*

29. Rule 89 (1) of the Pension Rules reads as follows:

> ***"89. Repeal and Saving.***
> *(1) On the commencement of these rules, every rule, regulation or order including Office Memorandum (hereinafter referred to in this rule as the old rule) in force immediately before such commencement shall, in so far as it provides for any of the matters contained in these rules, cease to operate."*

Entitlement to Pension; The Law cited:

30. A perusal of Rule 49 2(b) aforesaid makes it absolutely clear that in case a Government servant retires on attaining the age of superannuation after completing 10 years of service, he shall be entitled to pension at the prescribed rates. All the employees in the present case have not completed 10 years of regular service. They claim that the service rendered by them on daily rated basis before they were put in the work charge/regular establishment should be reckoned and counted in terms of Rule 13 and in the alternative, they pray that in terms of the decision of the Government, dated 14th May, 1968, quoted hereinabove, at least ½ of the service rendered on daily wage should be added to their regular service for the purpose of calculating the qualifying service rendered by them for the purposes of grant of pension.

31. The stand of the State is that Rules 2(b) and 2(c) specifically deal with persons in casual and daily rated appointment and persons paid from contingencies and they are excluded from the rules. Therefore, according to the State, the learned Tribunal gravely erred in holding that the benefit of the decision of the Government of India should be given to the employees in the present cases.

32. A large number of decisions have been cited before us by both sides. Reliance has been placed by the employees on the decision of a Division Bench of this Court rendered in **Shakuntla Devi versus The State of Himachal Pradesh and others, 1988 (2) SLC 18,** wherein this Court in para 6 passed the following order:-

> *"6. For the foregoing reasons, it appears expedient in the interest of justice to direct the State Government to consider in accordance with law and in conformity with the principles of equity, justice and good conscience and in light of the observations hereinabove made the question of granting to the deceased husband of the petitioner the benefit of ex-post-facto regularization of service and to work out and grant all the monetary benefits including the pensionary benefits due and admissible in accordance with law to the petitioner. Compliance to be report on or before February 29, 1988."*

33. A perusal of the aforesaid portion of the judgment clearly shows that this court did not itself give any finding with regard to the entitlement to pension, but directed the State to consider the same in accordance with law and in accordance with the principles of equity, justice and good conscience. This was a direction given in the context of the peculiar facts of the case and does not lay down any proposition of law.

34. The employees relied upon the judgment of the Apex Court in **D.S. Nakara and others versus Union of India, AIR 1983 Supreme Court 130.** We are of the considered view that this judgment has no applicability to the facts and circumstances of this case. In that case, the Apex Court only decided the question with regard to the arbitrary classification between the pensioners based on the date of retirement.

35. Similarly, the judgment of a learned Single Judge of Gujarat High Court in **Ratilal Hiralal Patel versus State, 1983 (2) S.L.R.**

43, is not applicable to the facts and circumstances of this case. In the present cases, we are mainly concerned with the question whether the employees are entitled to count the daily waged services rendered by them for calculating their qualifying service terms of the Pension Rules of 1972.

36. In **Kesar Chand versus State of Punjab and others, 1988 (5) SLR 27,** a Full Bench of the Punjab and Haryana High Court held that an employee is entitled to count the service rendered by him on work charge basis for counting the whole of his service for the purpose of calculating the pension and gratuity. The State of Himachal Pradesh is admittedly counting the service rendered on work charge basis for calculating the pension. This decision does not deal with the question of counting service rendered on daily wages for calculating the qualifying service for purposes of pension.

37. In **State of U.P. and others versus Ajay Kumar, (1997) 4 SCC 88,** the Supreme Court held that before the High Court can order regularization of an employee there must exist a post and there must be administrative instructions or statutory rules in operation to appoint a person to the post. The Supreme Court held "Daily wage appointment will obviously be in relation to contingent establishment in which there cannot exist any post and it continues so long as the work exists."

38. In **Union of India and others versus Rakesh Kumar, (2001) 4 SCC 309,** the Apex Court was dealing with a case in which members of the BSF who had resigned from their posts after serving for more than 10 years, but less than 20 years, had been held entitled to pension/pensionary benefits by a decision of this court rendered in CWP No. 761 of 1998. The Apex Court while dealing with Rule 49 of the Pension Rules held as follows:-

> *"16. x x x x x x x x x x x x . This would only mean that in case where a government servant retires on superannuation i.e. the age of compulsory retirement as per service conditions or in accordance with the CCS (Pension) Rules, after completing 10 years of qualifying service, he would get pension which is to be calculated and quantified as provided under clause (2) of Rule 49. x x x x x."*

39. The Court further went on to hold that this would only apply to the cases of retirement on superannuation or voluntary retirement after 20 years of qualifying service or compulsory retirement after the prescribed age. It further went on to hold that if the employee had resigned from service after completing more than 10 years of qualifying service, but less than 20 years, he would not be eligible to get pensionary benefits. Dealing with the question as to whether the court had the jurisdiction to issue a writ directing payment of pension on the ground of hardship, the Apex Court held as follows:-

> *"21. x x x x x x x x x. Therefore, by erroneous interpretation of the Rules if pensionary benefits are granted to someone it would not mean that the said mistake should be perpetuated by direction of the Court. It would be unjustifiable to submit that by appropriate writ, the Court should direct something which is contrary to the statutory rules. In such cases, there is no question of application of Article 14 of the Constitution. No person can claim any right on the basis of decision which is dehors the statutory rules nor can there be any estoppel. Further, in such cases there cannot be any consideration on the ground of hardship. If the Rules are not providing for grant of pensionary benefits it is for the authority to decide and frame appropriate rules but the Court cannot direct payment of pension on the ground of so-called hardship likely to be caused to a person who has resigned without completing qualifying service for getting pensionary benefits. As a normal rule, pensionary benefits are granted to a government servant who is required to retire on his attaining the age of compulsory retirement except in those cases where there are special provisions."*

40. A learned Single Judge of the Delhi High Court in **Kesri Devi versus Municipal Corporation of Delhi, 2005 (2) SLR 112,** held that the qualifying service is to commence from the date an employee

takes charge of the post to which she or he is substantively or in officiating capacity or temporary capacity appointed. Therefore, the entire period of ad hoc service rendered by a Safai Karamchari was directed to be taken into account while calculating her service. However, this decision does not take into account Rule 2 of the CCS Pension Rules.

41. A Division Bench of the Punjab and Haryana High Court in **Mangat Ram versus Haryana Vidyut Prasaran Nigam Ltd. and others, 2005 (5) SLR 793,** following the Full Bench Decision in **Kesar Chand's** case held that the period spent by the daily wager cannot be excluded while calculating the qualifying service as it was followed by regular service which was continuous. In **Ram Dia and others versus Uttar Haryana Bijli Vitran Nigam Ltd. (UHBVNL) and another, 2005 (8) SLR 765,** the service rendered on work charge basis has been directed to be taken into account. In both these cases the provisions of Rule 2 of the CCS CCA Rules have not been taken into account.

42. A learned Single Judge of the Punjab and Haryana High Court in **Babu Ram versus State of Haryana and others, 2009 (4) SLR 337,** again held that the services rendered by employees on daily wages should be counted towards their qualifying service. However, there is no discussion on this issue and it has been decided only on the basis of the previous judgments of the Punjab and Haryana High Court.

43. A Constitution Bench of the Supreme Court in **Secretary, State of Karnataka and others versus Uma Devi (3) and others, (2006) 4 SCC 1,** held as follows:-

> *"49. It is contended that the State action in not regularizing the employees was not fair within the framework of the rule of law. The rule of law compels the State to make appointments as*

envisaged by the Constitution and in the manner we have indicated earlier. In most of these cases, no doubt, the employees had worked for some length of time but this has also been brought about by the pendency of proceedings in tribunals and courts initiated at the instance of the employees. Moreover, accepting an argument of this nature would mean that the State would be permitted to perpetuate an illegality in the matter of public employment and that would be a negation of the constitutional scheme adopted by us, the people of India. It is therefore, not possible to accept the argument that there must be a direction to make permanent all the persons employed on daily wages. When the court is approached for relief by way of a writ, the court has necessarily to ask itself whether the person before it had any legal right to be enforced. Considered in the light of the very clear constitutional scheme, it cannot be said that the employees have been able to establish a legal right to be made permanent even though they have never been appointed in terms of the relevant rules or in adherence of Articles 14 and 16 of the Constitution.

50. It is argued that in a country like India where there is so much poverty and unemployment and there is no equality of bargaining power, the action of the State in not making the employees permanent, would be violative of Article 21 of the Constitution. But the very argument indicates that there are so many waiting for employment and an equal opportunity for competing for employment and it is in that context that the Constitution as one of its basic features, has included Articles 14, 16 and 309 so as to ensure that public employment is given only in a fair and equitable manner by giving all those who are qualified, an opportunity to seek employment. In the guise of upholding rights under Article 21 of the Constitution, a set of persons cannot be preferred over a vast majority of people waiting for an opportunity to compete for State employment. The acceptance of the argument on behalf of the respondents would really negate the rights of the others conferred by Article 21 of the Constitution, assuming that we are in a position to hold that the right to employment is also a right coming within the purview of Article 21 of the constitution. The argument that Article 23 of the Constitution is breached because the employment on daily wages amounts to forced labour, cannot be accepted. After all, the employees accepted the employment at their own volition and with eyes open as to the nature of their employment. The Governments also revised the minimum wages payable from time to time in the light of all relevant circumstances. It also appears to us that importing of these theories to defeat the basic requirement of public employment would defeat the constitutional scheme and the constitutional goal of equality.

> *51. x x x x x x x x x x x x x x x x x x x x x x x x x*
>
> *52. Normally, what is sought for by such temporary employees when they approach the court, is the issue of a writ of mandamus directing the employer, the State or its instrumentalities, to absorb them in permanent service or to allow them to continue. In this context, the question arises whether a mandamus could be issued in favour of such persons. At this juncture, it will be proper to refer to the decision of the Constitution Bench of this Court in Rai Shivendra Bahadur (Dr.) Vs. Governing Body of the Nalanda College. That case arose out of a refusal to promote the writ petitioner therein as the Principal of a college. This Court held that in order that a mandamus may issue to compel the authorities to do something, it must be shown that the statute imposes a legal duty on the authority and the aggrieved party had a legal right under the statute or rule to enforce it. This classical position continues and a mandamus could not be issued in favour of the employees directing the Government to make them permanent since the employees cannot show that they have an enforceable legal right to be permanently absorbed or that the State has a legal duty to make them permanent.*

44. The Supreme Court in **Principal, Mehar Chand Polytechnic and another versus Anu Lamba and others, (2006) 7 SCC 161,** while dealing with the questions whether the courts had any jurisdiction to direct regularization of the employees who had been continuing for long held as follows:-

> *"35. The respondents did not have legal right to be absorbed in service. They were appointed purely on temporary basis. It has not been shown by them that prior to their appointments, the requirements of the provisions of Articles 14 and 16 of the Constitution had been complied with. Admittedly, there did not exist any sanctioned post. The Project undertaken by the Union of India although continued for some time was initially intended to be a time-bound one. It was not meant for generating employment. It was meant for providing technical education to the agriculturalists. In the absence of any legal right in the respondents, the High Court, thus, in our considered view, could not have issued a writ of or in the nature of mandamus."*

Whether Court can direct regularization of an employee from an anterior date only with a view to make him entitled to pension de hors the rules.

45. From a perusal of the aforesaid judgments, it is apparent that the law has undergone sea-change in the last two decades. The Apex Court has clearly laid down that the court cannot order the permanent absorption of daily rated employees unless a sanctioned post is in existence. Even if a sanctioned post exists, it must be shown that the petitioner was initially appointed in accordance with law and back door entrants cannot be given benefit of regularization. In the present cases we are mainly concerned with the employees who have already been regularized in terms of a policy placed before and approved by the Apex Court in **Mool Raj Upadhyaya's** case, supra. The regularization has to be in terms of the said policy, i.e. after completion of 10 years of continuous service on daily rated basis. This policy continues to exist and holds the field till date, though the period of 10 years was reduced to 9 years and then to 8 years.

46. In a number of cases where the workmen had been employed much prior to the year 1994, the learned tribunal on the basis of **Shakuntla Devi's** judgment has directed that they be regularized after completing 10 years for the purpose of grant of pensionary benefits. We are of the considered view that these directions could not be given. The regularization/placing of the workmen on work charge basis was ordered by the Apex Court only from 1.1.1994. The learned tribunal could not have passed orders directing the services to be regularized from a date prior to 1.1.1994 even for the purposes of pension. These directions would be totally contrary to the decision of the Apex Court in **Mool Raj Upadhyaya's** case and also the scheme of

regularization specifically approved by the Apex Court in that case. We, therefore, hold that earliest regularization could only be w.e.f. 1.1.1994 and that too only on completing of 10 years continuous service with a minimum 240 days service in each calendar year.

47. The Apex Court in **Union of India and others versus Rakesh Kumar** supra has also clearly held that the pensionary benefit cannot be granted dehors the statutory rules. It has been laid down in unambiguous terms that the courts cannot direct payment of pension on the ground of so called hardship. A perusal of Rule 2 (b) and 2(c) of the pension Rules clearly shows that the rules do not apply to persons in casual and daily rated employment and persons paid from contingencies. No doubt, Rule 13 provides that the qualifying service of a government servant shall commence from the date he takes charge of the post to which he is first appointed either substantially or in officiating or temporary capacity. The contention of the petitioners is that the phrase "officiating or temporary capacity" shall include the appointment on daily wages also. We are afraid that we cannot accept this contention. Temporary service cannot be equated with service rendered on daily wages. We are aware that judgments of the Punjab and Haryana High Court and the Delhi High Court are to the contrary. However, as pointed out above, these courts have not taken into consideration the specific exclusion under rule 2 (b) and 2 (c) of the Pension Rules. In Kesar Chand's case, a Full Bench of the Punjab and Haryana High Court was only dealing with the service rendered on work charge basis. This service is being counted for purposes of pension by the State of Himachal Pradesh. However, the later judgments of the Punjab and Haryana High Court have applied the

judgment in Kesar Chand's case in cases of daily wagers also, but without taking note of the specific exclusion under Rule 2 (b) and 2(c) of the Pension Rules. We are of the view that Rule 13 only contemplates the counting of service which has been rendered after appointment on substantial, officiating or temporary capacity. This pre-supposes that appointment is in terms of the rules like the Temporary Civil Service Rules. Daily wagers have been specifically excluded and on a reading of the Rules, it cannot be said that the words "officiating and temporary capacity" cover the employees engaged on casual daily rated basis.

48. Even previously, we had held that the employees would not have been entitled to pension but for the issuance of the Office Memorandum, dated 14th May, 1968, it was only by taking into account this memorandum that we had given benefit to the employees of counting 50% of the service rendered on daily wages.

Whether the Office Memorandum No. F.12(1)E.V/68, dated 14th May, 1968 is no longer in force.

49. The main question raised before us by the State is that this Office Memorandum is no longer in force. As pointed out above before the Apex Court and initially even before this Court, the main argument was that the State of Himachal Pradesh had not adopted the Office Memorandum. As discussed above, since the State was a Union Territory, it was not necessary to adopt this Office Memorandum, which automatically became applicable to the State of Himachal Pradesh. On 30th March, 1974, the State issued a notification, which we have quoted in extenso hereinabove. Under this notification, both the Pension Chapter of the Civil Service Regulations as well as the Central Civil Service (Pension) Rules, 1972 (hereinafter referred to as the Pension Rules of 1972)were made applicable to the State of Himachal

Pradesh and were deemed to be in force in Himachal Pradesh during this period.

50. On behalf of the employees, it is urged that since both the Pension Chapter of the Civil Service Regulations as well as the Central Civil Service (Pension) Rules have been made applicable in the State of Himachal Pradesh, Rule 89 of the Pension Rules, which is the repealing clause, will have no effect on the applicability of the Pension Chapter of the Civil Service Regulations.

51. This contention has no merit whatsoever. Himachal Pradesh became a State on 25th January, 1971. The Civil Service Regulations including the Pension Chapter continued to apply in the State of Himachal Pradesh in terms of Section 49 of the State of Himachal Pradesh Act. The State in between decided to give an option to the employees to either opt for the Central Rules or the Punjab Rules. It later on decided to withdraw this decision and made the Central Rules applicable. When the notification was issued in the year 1974, the Pension Rules of 1972 were specifically made applicable to the State of Himachal Pradesh. Rule 89 (1) of the Pension Rules, quoted hereinabove, which is the repealing rule, clearly lays down that after the commencement of the Rules, every rule, regulation or order including the Office Memorandum in force immediately before the commencement of the 1972 Rules would be repealed insofar as the matter are dealt with under the Rules of 1972.

52. The contention made on behalf of the employees that the Pension Chapter of the Civil Service Regulations continues to be in force after the enforcement of the Pension Rules of 1972 cannot be accepted. Rules of 1972 were enforced by the Central Government

w.e.f. 1st June 1972. This would mean that from 25th January, 1971 till 31st May, 1972, the Pension Chapter of the Civil Service Regulations would continue to be in force and thereafter, the Pension Rules came into force.

53. In the State of Himachal Pradesh though the Rules were made effective from a previous date, even if we were to accept the plea that the rules cannot be given retrospective effect if they take away the rights of the parties, then also w.e.f. 30th March, 1974, when the notification in question was issued, the Pension Rules of 1972 would come into effect and the Pension Chapter of the Civil Service Regulations will cease to have any effect whatsoever.

54. The explanation given by the State is that it was necessary to adopt both the rules simultaneously so that the employees would be governed by the Pension Chapter of the Civil Service Regulations from 25th January, 1971 to 31st May, 1972 and thereafter, by the Pension Rules of 1972. This explanation is reasonable and must be accepted. There cannot be two sets of rules governing the same field, especially when the employees have not been given an option between the two rules. The latter rules, i.e. the Pension Rules, specifically repeal the earlier rules and, therefore, from the date when the latter rules came into force, earlier rules would cease to exist. In these cases, whether the latter rules are given effect to from 1st June, 1972 or from 30th March, 1974 will have no impact on the decision of these cases since all the employees rendered service after 1974.

55. The relevant portion of the affidavit filed by the Special Secretary (Finance) to the Government of Himachal Pradesh reads as follows:

> *"Moreover, Rule 89 (1) of the Central Civil Services (Pension) Rules, clearly envisages that on the commencement of these rules, every rule, regulation or other including Office Memorandum (hereinafter referred to in this rule as the old rule) in force immediately before such commencement shall in so far as it provides for any of the matters contained in these rules, cease to operate. Meaning thereby the provisions contained under Pension Chapter of the Civil Service Regulations (CSR) i.e. Old Rules stands repealed after the commencement of the Central Civil Service (Pension) Rules, 1972 from 1.6.1972.*
>
> *Therefore, even if the Govt. of India's O.M.F.N12(1)-E.V/ 68 dated 14.5.1968 had been appearing below article 368 of the Civil Service Regulation (CSR), it ceased to operate along with old rules i.e. Pension Chapter of the Civil Service Regulation (CSR) from 1.6.1972 i.e. from the commencement of the Central Civil Service (Pension) Rules, 1972.*
>
> *It is specifically mentioned that the purpose of the State Government to adopt the Pension Chapter of the Civil Service Regulations (CSR) vide Notification No. 2-4/71-Fin(reg)-II dated 30.03.1974 was only to facilitate the regulation of pension cases of Govt. servants in position and retired from service on or before 31.5.1972 under the old provisions of Pension Chapter of Civil Service Regulations(CSR)."*

We are of the considered view that at least after 30th March, 1974, the employee of the Government are governed only by the Pension Rules of 1972.

Whether the Office Memorandum is saved in terms of Rule 89 of the Pension Rules, 1972.

56. The next argument raised on behalf of the employees is that the repealing clause does not deal with the matter relating to counting the service rendered on daily wages by the employees. It is strenuously contended on behalf of the employees that Rule 89 of the Pension Rules does not repeal those memoranda which are not dealt with in the Rules of 1972. Therefore, according to the learned counsel for the employees, the Office Memorandum which dehors of the Rules

continues to be in force. This argument on first blush may seem to be attractive but on closer scrutiny and analysis, we are unable to agree with the learned counsel for the employees.

57. To appreciate this contention, we would again refer to Rules 13 and 14 of the Pension Rules. Rule 13 lays down that the qualifying service of a government servant shall start from the date he takes charge of the post to which he is appointed either substantively or in officiating or temporary capacity, in case the officiating or temporary service is followed without interruption by substantive appointment. As already held by us above, the appointment on daily wage service cannot be termed to be appointment in an officiating or a temporary capacity. A person who is appointed on officiating or temporary basis holds a civil post whereas a daily wager does not hold a civil post.

58. At the same time, we must add that Rule 13 is subject to the other provisions of the Pension Rules and Rule 14 would, therefore, govern the counting of qualifying service. Under Sub-rule 2 of Rule 14, 'service' has been defined to mean service under the Government but does not include service in a non-pensionable establishment unless such service is treated as qualifying service by that Government.

59. As pointed out above, Rule 2 of the Pension Rules specifically provide that the rule would not apply to persons in casual and daily rated appointment. There can be no manner of doubt that daily wagers and casual employees work in a non-pensionable establishment. The only question is whether the Government has taken a conscious decision to treat this service rendered on daily rated and casual basis to be qualifying service.

60. On behalf of the employees, it is contended that the Office Memorandum, dated 14th May, 1968, issued under Rule 368 is a decision of the Government to treat 50% service of daily waged employees as qualifying service. On the other hand, it is contended on behalf of the State that what Sub-rule 2 of Rule 14 postulates is a conscious decision taken by the Government after framing of the rules.

61. At this stage, we would also like to point out that under Rule 2 in addition to casual and daily rated employees, many other Government servants, such as railway servants, persons paid from contingencies, persons entitled to contributory funds, persons employed on contract are excluded from the application of the rules.

62. Earlier, the Pension Chapter of the Civil Service Regulations dealt with the issue of grant of pension to the employees of the Central Government. The employees entitled to pension were specifically mentioned in Regulation 352. Certain categories of the employees were not permitted to get pension. These were mainly employees or officers employed for limited time or duty or even officers whose services could be discharged on one month's notice. Regulation 368 of the Civil Service Regulations, which corresponds to Rules 13 and 14 of the 1972 Rules, reads as follows:

> *"368. Service does not qualify unless the officer holds a substantive office on a permanent establishment.*
>
> *Provided that in the case of an officer retiring from service on or after the 22nd April 1960; if he was holding a substantive office on a permanent establishment on the date of his retirement, temporary or officiating service under the Government of India, followed without interruption by confirmation in the same or another post, shall count in full as qualifying service except in respect of-*
>
> *(i) Periods of temporary or officiating service in non-pensionable establishment;*

(ii) periods of casual or daily rated service and
(iii)periods of service paid from contingencies."

63. Thus, under the Civil Service Regulations, periods of casual or daily rated services and period of service paid from contingencies were not to be taken into consideration for counting the qualifying service. The Office Memorandum, referred to above, was issued under this regulation and as per this Office Memorandum, the Government had decided that 50% of the service rendered by the employees paid from contingencies should be allowed to be counted towards the pension. Relying upon this Office Memorandum, we had, in our earlier judgment, held that no discrimination could be made between the service rendered on daily wages or service rendered by the employees and paid from contingencies and had, therefore, come to the conclusion that 50% of the service rendered on daily wages should be counted for calculating the qualifying service.

64. Under CSR 372, service of apprentice did not qualify for pension except in certain specified cases. An Office Memorandum was issued on 28th April, 1961/1st May, 1961, wherein it was made clear that the service rendered by a S.A.S. Apprentice in the Indian Audit and Accounts Department or the Defence Accounts Departments will be treated as temporary service and would count towards pension.

65. Rule 16 of the Pension Rules of 1972 reads as follows:

*"**16. Counting of service as apprentice.** Service as an apprentice shall not qualify, except in the case of SAS apprentice in the Indian Audit and Accounts Department or the Defence Accounts Department."*

It is obvious that if the old Office Memorandum was to continue, as contended on behalf of the employees, then there was no need to enact Rule 16.

66. Under CSR 368, the Government had taken another decision vide its memo, dated 16th February, 1959, whereby it was decided that contract officers, who were engaged on contract and were subsequently appointed to the same or a different post in a substantive capacity on pensionable post without interruption may be given the option of surrendering the government contribution of their Contributory Provident Funds together with interest thereupon and then they would be entitled to count one half of their contract service towards pension.

67. Rule 17 of the Pension Rules of 1972 reads as follows:

> *"**17. Counting of service on contract.** (1) A person who is initially engaged by the Government on a contract for a specified period and is subsequently appointed to the same or another post in a substantive capacity in a pensionable establishment without interruption of duty, may opt either-*
>
> *(a) to retain the Government contribution in the Contributory Provident Fund with interest thereon including any other compensation for that service; or*
>
> *(b) to agree to refund to the Government the monetary benefits referred to in Clause (a) or to forgo the same if they have not been paid to him and count in lieu thereof the service for which the aforesaid monetary benefits may have been payable.*
>
> *(2) The option under sub-rule (1) shall be communicated to the Head of office under intimation to the Accounts Officer within a period of three months from the date of issue of the order of permanent transfer to pensionable service, or if the Government servant is on leave on that day, within three months of his return from leave, whichever is later.*
>
> *(3) If no communication is received by the Head of Office within the period referred to in sub-rule (2), the Government servant shall be deemed to have opted for the retention of the monetary benefits payable or paid to him on account of service rendered on contract."*

This also provides for counting of service on contract for purposes of calculating the qualifying service.

68. CSR 380 provided that a press servant, who was paid on piece work basis, would be treated to be holding a substantive office if he was employed not casually, but as a member of fixed establishment for a period of at least 72 months uninterruptedly. There is no corresponding rule in the Rules of 1972. Would that mean that even under the Rules of 1972, such a person would be entitled to count his service for the purpose of pension? We are of the opinion that this cannot be the interpretation because the rule making authority before framing the new rules must be presumed to be aware about the old rules.

69. Similarly, under CSR 381, it was provided that certain service rendered by officers engaged in Settlement and Surveys Departments would qualify for pension whereas there is no corresponding provision under the new Rules. There are a lot of other rules/office memorandum under the CSR, some of which have been incorporated in the new rules and some have not been incorporated in the new rules.

70. When the 1972 Rules, which are the Rules within the meaning of Article 309 of the Constitution of India, were framed, the authorities took into consideration a large number of issues covered by the Office Memorandum, which were issued under the Civil Service Regulations. Some of the memoranda were incorporated in the new Rules and some were not. At this stage, we may point out that even in the printed versions of the book, except for reference to the Office

Memorandum, dated 14th May, 1968, we could not find reference to any other memorandum issued under the Civil Service Regulations.

71. If we accept the submission made on behalf of the employees, the result would be that the new rules would apply and wherever the new rules are silent, the Civil Service Regulations would apply. We are afraid that this is not the meaning of the repealing clause. When we read the repealing Rule 89, the words “insofar as it provides for any of the matters contained in these rules” has to be given a wider meaning. The expression 'provides for any of the matters', cannot, in our opinion, be interpreted in a manner as contended by the employees. This expression has to be given a wider meaning. No doubt, under Rule 14 of the 1972 Rules, the Government has the power to even count service rendered in a non-pensionable establishment for purposes of pension, but it would be required to issue specific orders in this behalf. 'Matters' must be read to mean the larger issues and not each and every individual memorandum which was issued. If the State, after taking into consideration these powers, as pointed out by us above, has granted pension to certain categories of employees in non-pensionable establishments, but the rules are silent with regard to other categories, which were similarly treated under the CSR Regulations, then the only Interpretation possible is that the Government did not want to grant pension to these employees. Under the new rules, the Government has made some employees working in non-pensionable establishments entitled to pension, such as contract employees, apprentices etc. However, this has been done by specifically making a provision in the Rules.

72. At the cost of repetition, we may state that under Rule 2, daily rated and casual employees were specifically excluded by the Rules. Rule 14 does empower the Government to include the service on a non-pensionable establishment, but some specific orders were required to be passed. When the old rules were repealed, the Office Memorandum went with the repealed rules.

73. As pointed out above, in certain cases, the Government, while framing the rules, included the persons, such as contract employees, probationers, apprentices, in the new rules, but where it did not do so, the intention of the rule making authority was clear that the benefit was to be given to only those categories of employees, who were specifically included in the Rules and not to others. No notification after the issuance of the 1972 Rules has been brought to our notice whereby the Government has taken a conscious decision to count the service of daily waged employees for the purposes of pension.

74. It was contended on behalf of the employees that if two views are possible, then the view favouring the employees should be taken. We have no quarrel with this proposition, but in this case, we are of the considered view that the view canvassed on behalf of the employees is not a possible view after we take into consideration Rule 89. If the Rules do not envisage counting of daily wage service towards qualifying service for pension, this Court cannot, by judicial fiat, direct that the daily wage service must be taken into consideration while calculating the qualifying service in terms of the Pension Rules. When we had delivered our earlier judgment, the State had not questioned the enforceability of the Office Memorandum, dated 14th May, 1968, but had only contended that this Office Memorandum did not apply

to daily wagers. Now, the contention is that the Memorandum stands repealed and we are of the considered view that for the reasons given hereinabove that the contention of the State appears to be correct and this Office Memorandum ceased to operate after the promulgation of the Rules of 1972.

75. One other contention on behalf of the employees is that in an Office Memorandum, dated 10th March, 1986, reference has been made to the earlier Office Memorandum, dated 14th May, 1968. We do not think that this would be sufficient to hold that the Office Memorandum, dated 14th May, 1968, still holds the field.

76. We may also note a contention raised on behalf of the State that since the employees had claimed pension in **Mool Raj Upadhayaya's** case and the Apex Court approved a scheme wherein there was no reference to such pension, it should be presumed that the Apex Court refused this prayer of the employees. We are unable to accept this argument put forth by the learned Advocate General. The judgment in Mool Raj Upadhayaya's case has only approved the scheme of regularization /grant of work charge status to the employees and there was no occasion for the Apex Court to decide the question whether the service rendered on daily wages should be counted towards qualifying service or not.

77. In view of the above discussion, we are of the considered view that the Pension Chapter of the Civil Service Regulations, which governed the employees earlier, stood repealed after the enforcement of the Central Civil Service (Pension) Rules, 1972 and the savings portion of Rule 89 of the 1972 Rules does not save the Office Memorandum No. F.12(1)E.V/68,

dated 14th May, 1968. Consequently, we answer the question framed by us earlier by holding that the service rendered on daily waged basis by the employees before their regularization/grant of work charged status cannot be taken into consideration for counting their qualifying service for grant of pension under the Central Civil Services (Pension) Rules, 1972. The writ petition is disposed of in the aforesaid terms.

(Deepak Gupta)
Judge

(V.K. Ahuja)
Judge

May 31, 2012
(rajni)